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ASSEMBLY BILL 14- section 3- addresses a major gap in Nevada death penalty legislation: the order of closing argument in the penalty phase of a death penalty trial.

AB 14 section 3 provides that in cases where the death penalty is sought:

The penalty hearing must proceed in the following order:

- (a) The District Attorney, or counsel for the State, shall open the argument
- (b) The defendant or his counsel may then respond:
- (c) The district attorney, or counsel for the State, may then argue in rebuttal; and
- (d) The defendant or his counsel may then conclude the argument in surrebuttal.

This proposed change is all about fairness. In any type of discourse, there can be something said for having the first words or the last words. But clearly allowing one side to get the first word and the last word gives that side an incredible advantage. If we are going to have the ultimate penalty, the least we can do is to make the process fair.

NRS 175.141 as now written provides for the order of trial in a criminal matter. Paragraph 5 specifies that "the District Attorney or the attorney for the state, must open and must conclude the argument".

At the trial stage, I have no quarrel with this statute. In a criminal trial there are strict rules of evidence and the entire burden of proof is on the prosecution. Therefore the state gets the final word.

The penalty phase of a death penalty trial is very different. The rules of evidence are relaxed and hearsay is admissible. The burdens of proof are also different.

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NRS 175.554 set forth when a verdict of death may be imposed:

Subsection(3) provides: THE JURY OR PANEL OF JUDGES MAY IMPOSE DEATH ONLY IF IT FINDS AT LEAST ONE AGGRAVATING CIRCUMSTANCE AND FURTHER FINDS THAT THERE ARE NO MITIGATING CIRCUMSTANCES SUFFICIENT TO OUTWEIGH THE AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES FOUND.

That means that unlike the trial where the burden is entirely on the state- there are two burdens in a penalty phase. The state must prove the existence of one or more aggravators and the defendant must prove that mitigation outweighs aggravation.

As a practical matter, in almost every death case at least one aggravator is proved beyond a reasonable doubt in the trial phase. ROBBERY, BURGLARY, OR MULTIPLE HOMICIDE or some combination thereof are most often the aggravating circumstances alleged in death penalty trials . In every penalty phase the jury has already found the defendant guilty beyond a reasonable doubt of murder and usually some other felony which is consistent with an aggravator enumerated in NRS 200.033.

This is not true of the defense case . The evidence of mitigation has not been placed before the jury prior to penalty phase.

To avoid being death eligible, the Defendant, has the burden in Nevada of proving that mitigation out weighs aggravation and thus has a burden of proof and should be given a rebuttal argument. Because the legislature has not previously addressed the issue of final argument in penalty phase, the courts have simply applied NRS 175.141 and given the state 2 arguments.

This legislation recognizes the dual burdens of proof in capital litigation and allows both sides to have a rebuttal argument.

Section 3 of ASSEMBLY BILL 14 by adding NRS 175.554 addresses the issue of how argument should proceed.

The current law, NRS 175.141, provides only that the state must open and close argument. This allows the state to give two closings arguments. The term rebuttal is not used. Currently the prosecutor may, and often does, give a very short opening argument and save all of his or her most important arguments for after the defense has made its single argument. Often times, prosecutors propose issues in final argument that have not previously been addressed, knowing the defense will never have an opportunity to answer or explain.

AB 14 provides that the state will argue and then the defense will argue. The state then can rebut - which means answering what the defense has argued and the defense can offer surrebuttal to answer the state's rebuttal. This would contemplate that attorneys can only respond to what was proffered by the other side in their rebuttal. NEITHER side would be free to "sandbag" the other side by offering new argument in its rebuttal. That is the common law approach and consistent with the rules of debate. Most importantly, this approach legislates and guarantees fairness in final argument.

For those legislators who support Capital Punishment, this is an issue that is raised in almost every appeal. Clarifying the law will help end the long appellate process which bothers almost everyone.

Most major jurisdictions allow the defendant in a death penalty sentencing phase to have the final word. CALIF, NY, PENN, KY and S.Carolina to name a few.

The practical effect of this legislation is that very few cases are determined by who argues last. A case like Zane Floyd - a recent quadruple homicide case will never rest on who argues last.

But I have litigated and supervised other attorneys handling death penalty cases for the past 9 years. Allowing the prosecution in a death penalty case to get the first word and the last word to the jury is a tremendous advantage and I believe that in a close case, it may make a difference. An unfair difference.

There has also been some question whether AB14, specifically section 3, is in conflict with NRS 176.015 subsection 3, which gives the victim the last word at a sentencing hearing. There is no conflict. Victims do not make the final argument in a death penalty trial. The district attorney or other counsel for the state do.

NRS 176.015 refers to the hearing where the Court actually imposes the sentence rendered by the jury. That is done some 45 days later and at that hearing the victim or their representative will be allowed to speak last.

Finally, for the defense in a death penalty case, our client having already been found guilty of first degree murder, our issue, our goal is mercy. My other question for this body is whether we want a criminal justice system where the State of Nevada has the last word and that word is to rebut mercy?

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